United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1113

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arbolede, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT REPLY BRIEF FOR APPELLANTS

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ARGUMENT

POINT I AND II

THE GOVERNMENT'S PROOF SHOWED THREE SEPARATE CONSPIRACIES RATHER THAN ONE. THE SHOCKING AND INFLAMMATORY TESTIMONY ON SEGMENT II, PREJUDICED EACH OF THE APPEALING DEFENDANTS AS DID VOLUMINOUS TESTIMONY IN THE SEGMENTS WITH WHICH THEY WERE NOT CONNECTED. THE GOVERNMENT ERRED IN FAILING TO MARSHALL THE EVIDENCE AND IN FAILING TO APPROPRIATELY FOCUS THE JURY ON THE INDIVIDUAL GUILT OF EACH DEFENDANT.

The government's brief contains many misstatements of fact, unwarranted assumptions and inappropriate application of facts to the applicable law with respect to the issue of multiple conspiracy. This reply brief will be directed only to such misstatements as they apply to Points I and II of appellants' Joint Brief. Points I and II shall be treated together. Point III shall be treated in the reply brief of Leon Velez.

On page 91 of its brief, the government states:

> "The question whether the government has shown multiple conspiracies or a single conspiracy is primarily one for the jury to decide rather than the trial judge or this court."

The statement begs the question: First, the District

Court has an obligation to make an intitial determination on the connected issue of Improper Joinder under Rule 14. During trial all counsel moved for severance because of improper joinder. The motions were denied.

Secondly, on the question of suppression of evidence, the court must decide whether testimony of various segments should be suppressed as against defendants in other segments. All counsel moved for suppression of Segment II testimony as against them.

Lastly, this court has been reviewing this issue since the Kotteakos decision and before. It is indeed novel for the government to take the position that this court is somehow no more than a rubber stamp for the trial jury at this late date.

The government defends Judge Cannella's charge as clearly meeting the standards set down by this court in Bynum, 485 F.2d 490, [Government's brief, p. 12]. The District Court has an obligation to properly guide the jury in its determination of whether there is a single or multiple conspiracy. United States v. Borelli, [2d Cir. 1964] 336 F.2d 276. The District Court spoke only in the most general terms, without discussing with the jury questions such as the overlap of personnel, common funds, common time frames or whether there were common witnesses testifying against some or all of the defendants. These are all

tests set down by this court. Likewise, the district court totally failed to focus the jury's attention on the role of each defendant with respect to the conspiracy or conspiracies. [For a more thorough exposition of this point, see Appellants' Joint Brief, Page 60]. Judge Cannella gave an "all or nothing charge" placing the jury in a position of acquitting all defendants or convicting all if they found a single conspiracy. In point of fact, a proper exposition of the law would have instructed the jury that if they found more than one conspiracy they must then proceed to the next issue of determining who among the defendants were in all of the conspiracies. Only those in all conspiracies could be found guilty. United States v. Kelly 349 F.2d 757. Failure to give such a charge is plain error. [See Appellants' Joint Brief, footnote 43, page 61].

The government raises the additional point that even if more than one conspiracy were shown at trial, the defendants were not prejudiced. [Government Brief, page 110]. They allege that the proof of Segment II was admissible on other grounds, to wit, prior similar acts, and the proof tended to corroborate the testimony of Caban and Fernandez. Initially, the testimony of Andreis, if admitted on the theory of prior similar acts would have required limiting instructions from the court. United States v.

Colasurdo, 453 F.2d 585, 591 [2d Cir. 1971] Cert. Den. 405 U.S. 917 [1972]; United States v. Klein, 340 F.2d 547, 548-49 [2d Cir. 1964] Cert. Den. 382 U.S. 850 [1965]; United States v. Stanton, 336 F.2d 326, 328 [2d Cir. 1964]. The government cannot use that theory at this late date.

Secondly, even if the Andreis testimony was used for the limited purpose of corroborating Caban, the prejudice to the defendants far outweighed its probative value. However, the government did not limit Andreis' testimony on direct examination to the corroboration of Caban or Fernandez. In point of fact, it was the government that brought out the most prejudicial and damaging portion of his testimony [T-1976-2059]. It was the government on direct examination who elicited his criminal records [T-1977, 2051-2058], the amount and quantity of his drug trafficking [T-2022], and the amount of money made in his various activities. It was the government who brought out the age of Rhonda Sue Shirah through Andreis [T-2013-14]. Only one defendant questioned Andreis on cross-examination and that was defendant Robinson. His cross-examination was as a result of incriminating matter brought out as against him on direct examination. Appellants contend Robinson was a part of a separate conspiracy not connected with them. It should be noted that Andreis' testimony went far beyond merely corroborating the testimony of

Carmen Caban. No questions were asked of Andreis by Jorge Gonzales, Roldan, Gomez, Velez, Beatrice Gonzales [T-2217, 2220]. Defendant Arco asked one question [T-2220], defendants Botero and Gill asked four questions [T-2218] and defendant Parra asked five questions [T-2219].

The government raises the point of appellants' reference to Andreis' background on summation at page 111 of its brief. Defendants reference to Andreis' testimony on summation was an attempt to offset its prejudicial effect which was elicited in the first instance by the government.

On page 96 of its brief, the government states that Leon Velez received:

> "Narcotics proceeds from Sarimento on more than one occasion for payment to Alberto and Bruno Bravo."

Nothing contained on the pages cited by the government [T-3962-73, 7360, 7366] substantiates this allegation.

On page 98 of its brief, the government states that:

> "Alvaro Hernandez negotiated with Botero in the presence of Rita Ramos." [T-274-77].

Nothing at those pages indicate Botero negotiated with Alvaro Hernandez.

On page 98, the government states categorically that Botero, Rincon, Gonzales and Cabrera worked together selling cocaine. This is inaccurate.

The government suggests that there was an ongoing

continuous relationship between Cabrero and Andreis since December, 1972. [Government Brief, page 98]. In point of fact, Cabrero picked up one shipment of marijuana in December, 1972 from Andreis but did not actually meet Andreis until late, 1973. [Page 20, Appellants' Joint Brief].

The government allegation that Andreis was a courier for Cabrero is patently absurd on its face. Any reading of the record would indicate that Andreis was a private entrepeneur and certainly not a courier. [See appellants Joint Brief 18-25].

The government claims that the appellants' chart on page 39 of their Joint Brief is inaccurate because of the omission of certain individuals. Clearly, the chart is schematic and does not pretend to be complete. It would be virtually impossible to include all 410 co-conspirators in a single chart. The government further states on page 95 of its brief that appellants concede that the members of each group dealt in a conspiratorial relationship within that group. Appellants make no such concession nor is that the issue to be decided on this appeal. The chart is merely an effort to pictorialize the alleged relationships of the individuals listed in the indictments. The listing of Parra and Gomez as couriers add nothing to the issue of whether there was proven one or three conspiracies. Even assuming

there was more of a core group than shown on the schematic diagram, or that there were other individuals tangentially common to both group I and group III, these gossamer connections do not make out a single conspiracy. This is particularly true of those relatively low down on the conspiratorial ladder such as the couriers.

The government, in its brief on page 104, states:

> "Appellants concede that the groups they call 'one' and 'three' had a common director from the 'Bravo Group' in Colombia."

Appellants concede only that Segment I and Segment III both received cocaine from the Bravo Group and not that the Bravo Group controlled or directed all of the personnel in the two groups. Nor is such a common source indicative of a single conspiracy. This court has repeatedly held that the links at the top of a group may show a conspiracy as to the core but as to the lower level personnel, there may be a separate organizational grouping of two or more conspiracies.

At page 105 of the government's brief, the government states:

> "...except for Andries' testimony as to a single transaction with 'Bravo II'; the record is silent as to the source of cocaine in so-called segment two..."

It is the government's obligation to show that there was

a common source of cocaine and not a burden upon the appellants to show that there was not a common source. "The single transaction" referred to by the government, is stark evidence that Andreis was a private entrepreneur and not a part of the Segment I or Segment III conspiracies. The government attempts to minimize the importance of the variance as to the Segment II conspiracy. They suggest that bringing in the proofs of the Segment II conspiracy added only four defendants to the trial. [Page 109, Government Brief]. What the government neglects to bring out, is the fact that the proof as to the Segment II conspiracy added between 50-75 co-conspirators unrelated in any way to the Segment I or to the Segment III conspiracies and who would not have been a part of the trial had the Segment II proof been omitted.

Lastly, the government alleges that the failure to submit written summaries of appellants contentions as requested by the court obviated any error on the part of the court in failing to marshall the evidence. In conferences with the Assistant United States Attorney, he advised me that he was in error with respect to this point and intended to submit a clarifying statement to the court. In point of fact, defendants Parra and Gomez submitted written summaries of their contentions, pursuant to the

court's request, which the court refused to submit to the jury

CONCLUSION

THE JUDGMENT OF CONVICTION
AGAINST ALL APPELLANTS SHOULD
BE REVERSED.

Dated: New York, New York
August 13, 1976

Respectfully submitted,

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State of New York } ss
County of N.Y. }

Leonard J. Levenson, affirms under penalty of perjury:

1. I am not a party to this action and over 18 yrs old.

2. On August 18, 1976 I served 2 copies of the enclosed brief on Robert Fiske, Jr. U.S. attorney for Southern District of N.Y. by placing 2 copies of the reply brief in a enclosed postpaid wrapper addressed to Mr. Fiske at 1 St. Andrew Plaza, New York, NY. and depositing it in an official US Postal Service depository located at 11 Park Place, New York, NY.

Leonard J. Levenson

Dated: Aug 18, 1976